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UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

SAMUEL J. SMOLEN JR., 85A4082,

Plaintiff,

-V-

SGT. PETER CORCORAN, LT. DIXON, and MR. DUBRAY, Central Office - D.O.C.S. Tier Hearing Review Official,

Defendants.

SAMUEL J. SMOLEN, JR., 85A4082,

Plaintiff,

-V-

C.O. T. ORLOWSKI, C.H.O. J. SCHOELLKOPF, ADIR VENETTOZZI, C.O. A. KOZAKIEWICZ, C.O. E. SCHUESSLER, I.G. RICHARD ROY, SUPT. JAMES CONWAY, SGT. MARKOWSKI, and C.O. GARY PRITCHARD,

Defendants.

DECISION AND ORDER 10-CV-6040CJS



DECISION AND ORDER 10-CV-6637CJS

Plaintiff *pro se* Samuel Smolen filed an action on January 25, 2010, case number 10-CV-6040, of which only the first amendment claim in the amended complaint survived (Order, Docket No.7). Summonses were issued and the amended complaint was served.

On September 14, 2010, the defendants filed their answer to the amended complaint (Docket No. 8).

Plaintiff also filed two additional cases, 10-CV-6439 on July 30, 2010 and 10-CV-6443 on August 2, 2010. In the interest of judicial economy, these two cases were deemed supplements to the first case and the cases were ordered closed. Plaintiff was directed to file a second amended complaint in 10-CV-6040 in which he was to include the original surviving first amendment claim from the amended complaint and the claims made in the two new actions (10-CV-6040, Docket No. 11). Plaintiff then received two extensions of time to file the second amended complaint in 10-CV-6040 (Docket Nos. 14 and 15) with the last extension to expire on February 14, 2011. Plaintiff has not filed a second amended complaint, as directed in 10-CV-6040, nor has he requested another extension of time.

The Court now reviews a fourth case that plaintiff has filed, 10-CV-6637, following completion of his application for *in forma pauperis* status (Docket No. 6). The allegations in this fourth case also relate to the allegations in 10-CV-6040, 10-CV-6439 and 10-CV-6443. In all four cases, plaintiff states that he complained about staff at Attica Correctional Facility to some combination of contacts to include officials at Attica, the central office of the Department of Correctional Services, the governor, F.B.I., news media, and by posting the information on a family website. Plaintiff also alleges, in all four cases, that the defendants then retaliated against him in 2007, and in some cases in later years, for making the complaints.

In the interest of judicial economy, case number 10-CV-6637 is now also deemed a supplement to the first action, 10-CV-6040. Plaintiff is directed to file a second amended

complaint in 10-CV-6040 in which he includes the original surviving first amendment claim from his amended complaint (Docket No. 6) and the claims made in the three subsequent actions by **October 14, 2011.** Case number 10-CV-6637 is to be closed. This Order grants plaintiff a final extension until **October 14, 2011** to file a second amended complaint which includes the claims from case numbers 10-CV-6439 and 10-CV-6443. If plaintiff does not file a second amended complaint as directed by **October 14, 2011**, the first amendment claim from the amended complaint (10-CV-6040, Docket No. 6) will proceed forward, and all remaining claims from cases 10-CV-6439, 10-CV-6443, and 10-CV-6637 will be dismissed with prejudice.

Plaintiff is advised that his second amended complaint to be filed in 10-CV-6040 is intended to **completely replace** the amended complaint already filed in the action. See *Arce v. Walker*, 139 F.3d 329, 332 n. 4 (2d Cir. 1998) (quoting *International Controls Corp. v. Vesco*, 556 F.2d 665, 668 (2d Cir. 1977)); *see also Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994). Therefore, plaintiff's second amended complaint must include all of the allegations against each of the defendants regarding the claims he is permitted to raise in this second amended complaint, so that the second amended complaint may stand alone as the sole complaint in this action which the defendants must answer.

Plaintiff is forewarned that if he fails to file a second amended complaint as directed by **October 14, 2011**, the first amendment claim in the amended complaint (10-CV-6040, Docket No. 6) will proceed forward, and all remaining claims will be dismissed with prejudice.

<u>ORDER</u>

IT HEREBY IS ORDERED, that plaintiff is directed to file a second amended complaint in 10-CV-6040 as directed above by **October 14, 2011**;

FURTHER, that the Clerk of the Court is directed to send to plaintiff with this Order a copy of the amended complaint in 10-CV-6040, and the original complaints in 10-CV-6439, 10-CV-6443, and 10-CV-6637, a blank § 1983 complaint form, and the instructions for preparing an amended complaint;

FURTHER, that the Clerk of the Court is directed to close 10-CV-6637; and

FURTHER, that in the event plaintiff fails to file a second amended complaint as directed above by **October 14, 2011**, the first amendment claim in the amended complaint (10-CV-6040, Docket No. 6) will proceed forward and remaining claims from 10-CV-6439, 10-CV-6443, and 10-CV6637 will be dismissed with prejudice without further order of the Court.

SO ORDERED.

Dated:

<u>SEPT. 14</u>, 2011

Rochester, New York

CHARLES J. SIRAGUSA
United States District Judge

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